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Thirty-first session

SUMMARY RECORD OF THE 633rd MEETING

Held at Headquarters, New York,
on Monday, 1 June 1998, at 3 p.m.

Chairman: Mr. MAZILU (Romania)

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PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued)

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The meeting was called to order at 3.10 p.m.

PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued) (A/CN.9/444 and Add.1-5)

General comments on the draft chapters of a legislative guide on privately financed infrastructure projects (continued) (A/CN.9/444)

1. Mr. RESTREPO-URIBE (Colombia) said that, despite the complexity of the issues involved, it was important to build on the valuable work done by the Secretariat in preparing the draft chapters of a legislative guide on privately financed infrastructure projects. The guide would enhance the effectiveness of Governments in the planning and execution of projects and be of benefit to local authorities, which often lacked experience in the monitoring of development projects.

2. Ms. GUREYEVA (Russian Federation) said that, while the subject was a complex, sensitive and relatively new one, the Commission's main goal should be to finalize the draft chapters of the guide, which could at a later stage serve as a basis for model contracts.

3. Mr. LALLIOT (France) said that selecting provisions of the guide for use in model contracts might not be the best approach. It was important to first determine whether the provisions of the guide should be of a binding or a flexible nature. France would prefer a more flexible approach that would give States more room for manoeuvre.

4. Mr. OLIVENCIA RUIZ (Spain) acknowledged the difficulties posed by the conceptual and terminological differences between the internal traditions of States in the field of privately financed infrastructure projects. He therefore proposed the creation of a working group to prepare a set of draft model laws, on which the Commission might be ready to take a decision at its next session.

5. Ms. GIOIA (Italy) said that one of the Commission's main objectives at its current session should be to seek a balance between the public interest in retaining control of infrastructure projects and the interests of the private parties financing the projects, who were more concerned with their effective implementation.

6. Ms. SABO (Observer for Canada) supported the proposal made by the representative of Spain that a working group should be established to consider further the draft legislative guide. A decision on whether the guide should contain sample provisions or contractual provisions could be taken if and when such a decision became necessary.

7. Mr. ESTRELLA FARIA (International Trade Law Branch) drew the Commission's attention to the suggestion contained in paragraph 31 of document A/CN.9/444 that the Commission should devote the first five days of the session to an in-depth discussion of the draft legislative guide. The Commission might therefore wish to consider the proposed structure of the guide, the concept of the draft chapters and, where appropriate, the desirability of formulating the legislative

recommendations in the form of sample provisions for the purpose of illustrating possible legislative solutions for the issues dealt with in the guide.

8. Mr. MARKUS (Observer for Switzerland) said that, given the many differences in national laws governing privately financed infrastructure projects, it might be better to focus on the elaboration of a set of broad fundamental principles to which national legislators could refer rather than on the elaboration of binding legislative provisions. It would be impossible, moreover, for the Commission to complete its work on time if it attempted to address the many issues that would arise in the drafting of contractual provisions.

9. The CHAIRMAN said that there appeared to be general agreement that the proposed guide should be a flexible instrument. The most constructive approach to the discussion of the draft provisions might be to follow the suggestion contained in the report of the Secretary-General (A/CN.9/444), to which the representative of the Office of Legal Affairs had just referred, and to begin consideration of the addendum to the report of the Secretary-General which provided background information on privately financed infrastructure projects (A/CN.9/444/Add.1).

10. It was so decided.

Paragraphs 1-29

11. Mr. GUISLAIN (Observer for the World Bank) said that it might be possible to shorten the introduction by omitting the discussion of the privatization of public infrastructure and exploitation of natural resources contained in paragraphs 5 to 7.

12. Mr. WALLACE (United States of America) said that he generally shared the view just expressed by the representative of the World Bank. The draft guide was intended to be an enabling instrument for national legislators, but deciding on its scope would be no easy matter.

13. Mr. LALLIOT (France) said that it would be more accurate to use a broader and more generic term such as "collectivité publique" (public body) or "personne publique" (public person) instead of "Etat" (State), since contracts could also be awarded by legal persons other than the State. Moreover, the term "exploitant privé" (private operator) would have been acceptable only if the text contained no references to other types of operators, which was not the case. It might therefore be better to omit the adjective "private" altogether. In the discussion of the operation regime, it was important to distinguish between the description of an activity and the description of the body that carried out that activity. Lastly, in paragraph 28, the English term "procurement" was more accurately rendered by the French term "passation de contrats" than "passation de marchés". Also the word "adjudication" (award) in the same paragraph seemed inappropriate.

14. Ms. ALLEN (United Kingdom) said that the definition of "turnkey contract" in paragraph 29 should be amended to distinguish between such contracts and "project management agreements".

15. Mr. LAMBERTZ (Observer for Sweden), speaking on a point of order, asked whether the Secretariat would be responsible for acting on the comments made by the members of the Commission, and whether the Commission would take decisions on the basis of the general discussion.

16. He agreed that an excessively voluminous text would prove overwhelming and that only the most salient points should be retained.

17. The CHAIRMAN suggested that issues relating to principles should be decided upon by the Commission, whereas technical questions could be taken up by the Secretariat. It was important for the members of the Commission to have the opportunity to exchange their views on matters of principle.

18. Mr. KOVAR (United States of America) said that, in the interest of clarity and simplicity, the Secretariat, in consultation with appropriate experts, could investigate alternative ways of presenting the definitions in paragraphs 8 to 29.

19. He also suggested the introduction of the concepts "developer" and "sponsor"; his delegation would submit a proposal for the definition of those terms.

20. Ms. NIKANJAM (Islamic Republic of Iran) said that apart from the fact that placing a section on terminology near the beginning of the guide was confusing, some expressions were rather vague. She suggested that amendments should be made in such a way as to make the text self-explanatory.

21. Mr. CHOUKRI (Observer for Morocco) pointed out an apparent contradiction between the first sentence of paragraph 7 of document A/CN.9/444/Add.1 and the third sentence of paragraph 2 of document A/CN.9/438/Add.1, both of which dealt with the scope of the guide. He wondered whether there had been a change in the Commission's approach, and enquired about the link between privatization and the exploitation of natural resources. It would be preferable to delete paragraph 7 altogether.

22. Mr. ESTRELLA FARIA (International Trade Law Branch), responding to the points raised by the Observer for Morocco, referred to paragraph 240 of the Commission's report on the work of its thirtieth session (A/52/17), which expressed the Commission's support for not dealing with transactions for the "privatization" of State property by means of the sale of State property or shares of State-owned entities to the private sector. There had been no change since the draft was discussed in 1997.

23. Concerning the use of the term "concession", he said that it was often used in many legal systems and had been deemed appropriate for inclusion as a concept in paragraph 7. However, if Commission members considered the current draft too lengthy, the Secretariat would take their comments into account when preparing the revised version.

24. Mr. AL-ZEAD (Observer for Kuwait), referring to paragraph 14, asked for clarification on the subcontracting of concessions.

25. Mr. ESTRELLA FARIA (International Trade Law Branch) said that document A/CN.9/444/Add.5 included sections which would provide a full response to the question raised by the representative of Kuwait.

26. Mr. LIU Yang (China) pointed out that the definition of "BOT" could be found in paragraph 17 and not in paragraph 16, as stated in paragraph 20.

Paragraphs 30-43

27. Mr. CARNEGIE (Caribbean Law Institute Centre) said that although "foreign source of capital" was discussed later in the text, it was a sufficiently important topic to merit inclusion as part of the background information provided in section B.

28. Mr. PEREZ (Colombia) said that some of the information contained in paragraphs 31 to 34 could be included in the earlier part of the text dealing with the purpose and scope of the guide, and that the historical background on the projects under discussion could be eliminated.

29. Mr. LALLIOT (France) said that, on the contrary, he believed that historical references would remind readers of the theoretical foundations of the relevant concepts and terms.

30. Mr. GUISLAIN (Observer for the World Bank) agreed with the representative of France, noting that legislators often forgot that private sector participation in the development of infrastructure and services was not a new phenomenon.

31. Mr. RESTREPO-URIBE (Colombia) said that his delegation did not underestimate the value of the task accomplished by the Secretariat in trying to condense the historical aspects of the legislative guide. Such historical references would be more appropriately placed in the introduction, rather than in the substantive portion of the text.

32. Ms. NIKANJAM (Islamic Republic of Iran) said that there was no need for a historical background on privately financed infrastructure projects.

Paragraphs 44-61

33. Mr. CHOUKRI (Observer for Morocco) said that the use of the word "commercial" in paragraph 46 was misleading, as all projects were commercial from the point of view of banks.

34. He thanked the Secretariat for giving special attention to Islamic financial institutions by devoting paragraph 53 to them. However, the last sentence of that paragraph gave rise to concern that such institutions might be singled out for special scrutiny. He therefore suggested that the last sentence should be deleted.

35. Mr. RENGER (Germany) said that he wished to suggest that the words "and project shareholders" should be added after the word "borrower" in the penultimate sentence of paragraph 48.

36. In paragraph 50, it should be pointed out that institutional investors frequently required credit ratings from their borrowers.

37. Ms. ALLEN (United Kingdom) suggested that export credit agencies should be referred to in paragraph 56 as well as paragraph 57.

38. Mr. LIU Yang (China) said that paragraphs 48 and 49 placed too much emphasis on privileged loans, as under the domestic law of some countries there could be no privileged form of debt even if the debt was guaranteed.

39. Mr. GUISLAIN (Observer for the World Bank) said that, in paragraph 44, either a more exact definition of public-private projects should be provided or the reference to such projects should be omitted.

40. With respect to subsection 3(d), it was important that a specific reference to shares as a form of capital market funding should be included.

41. In paragraph 54, the provision of advice should be included as an element of the role played by international financial institutions.

42. Mr. SHANKS (United States of America) said that the concept of non-limited resource financing should be introduced earlier in section B.3 and given greater emphasis. A reference should also be made to the importance of capital market financing and local capital financing for infrastructure projects. He also agreed with the remarks made by the United Kingdom representative on the reference to export credit agencies.

43. Mr. LALLIOT (France) said that the references to the "operational phase" of projects should be moved to the end of subsection 4, i.e., just before the discussion of phases of execution in subsection 5.

44. With respect to paragraph 48, we doubted that some of its wording was compatible with French law, which upheld the principle that no public entity could be deprived of all its assets.

45. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the point raised by France was taken into consideration in another part of the guide. However, in order to meet the objection raised by France, the phrase "to the extent permitted by the law of the host country" might be added to the sentence in paragraph 48 referring to the use of negative pledges.

46. Ms. GÜRAY (Observer for Turkey) suggested that the words "partial guarantees" should be added after the word "guarantees" in the second line of paragraph 54.

47. Mr. OLIVENCIA RUIZ (Spain) said that the term used in paragraph 45 to refer to the providers of equity capital should be broad enough to cover all such providers, which were not necessarily either consortiums or companies.

48. Mr. AL-ZEAD (Observer for Kuwait) suggested that in paragraph 50 the term "insurance institutions" should be used rather than "insurance companies".

The meeting was suspended at 5 p.m. and resumed at 5.25 p.m.

Paragraphs 62-92

49. Ms. ALLEN (United Kingdom) said, in connection with paragraph 87, that in her country payment methods for contractors might include two or even three payment streams: an availability charge, a services payment and sometimes a volume-related payment.

50. In connection with paragraph 89, she pointed out that in the United Kingdom insurance market underwriters were now putting together fully integrated project insurance packages, thus reducing the risk that insurance policies might fail to cover all contingencies as well as reducing overall project costs.

51. Mr. OLIVENCIA RUIZ (Spain), in the context of paragraphs 68 to 71 under the heading "The project company and its shareholders", referred to his earlier comments about excessively restrictive terminology in respect of the types of entities that could carry out projects. The entities carrying out projects could be consortiums of one kind or another with members whose legal standing varied, or temporary unions of companies participating in a specific project.

52. He took issue also with the inclusion of references to shareholders: the reference should be to the members of or participants in consortiums.

53. Mr. LALLIOT (France) expressed his wholehearted support for the previous speaker's comments, and drew attention to a concept in paragraph 66 that would be a problem for members of the European Union at least. The sentence "Additionally, the host Government might be interested in creating employment opportunities for local workers ..." fell foul of article 6 of the Treaty of Rome, which banned any kind of discrimination based on nationality. The problem might be solved by adding a nuance: "... subject to the relevant provisions of national laws".

54. Mr. GUISLAIN (Observer for the World Bank) said that paragraph 66 raised the important point of what a host government's objectives might be in wanting to involve the private sector, and the first sentence, which expressed the objective as obtaining high-quality infrastructure that would benefit the economy by providing needed services, was at least as good as any other definition. However, he agreed with the previous speaker that the second sentence in paragraph 66 could be problematic, and added that a private infrastructure contract was not the best way to create employment or transfer advanced technology. The objective should primarily be the provision of good infrastructure, and the simpler the technology, the better. The second sentence should therefore be deleted and replaced, somewhere in the guide, with language that focused governments' attention on why they wanted a particular project and encouraged them to make sure their objectives were being achieved through the legislation they would pass and the contracts they would enter into.

55. He believed that in paragraph 68 as compared to paragraph 86 there was too much emphasis on heavy construction companies. Eurotunnel and other experiences had shown that that was not the right emphasis: the objective, as before, was the provision of services, and construction companies as concessionaires did not

spring immediately to mind in such a context. Therefore, governments should be encouraged to retain companies with expertise in service provision rather than, in construction, and with solid track records of efficiency and effectiveness, which would then hire contractors and so on.

56. In the draft chapters there were many references, implicit and explicit, to the dangers of conflict of interest. Those dangers could not be underestimated.

57. In the context of paragraph 91, he warned against relying on merchant banks for analyses of the economics of a project or major issues of sector structure and competition. While such analyses were critical in the context of privately financed infrastructure projects, for merchant banks remuneration depended on the size of the transaction; bigger amounts of money were not necessarily better for the country concerned, but good services in a competitive environment were.

58. Mr. RENGER (Germany) said that if the Commission wished to shorten document A/CN.9/444/Add.1, section B.4, "Parties involved in infrastructure projects", was the obvious candidate for being cut down as many of the parties were already mentioned in section B.3 and a degree of merging might be possible.

59. Paragraph 77 discussed the ways lenders could insulate themselves from risks, including pre-completion risks. There was no mention in that connection of pre-completion guarantees, whereas some lenders were not prepared to undertake any pre-completion risk at all.

60. In paragraph 89, on insurers, reinsurers were not mentioned although reinsurance in the international market was very important for many participants in projects.

61. In paragraph 90, on the role of independent experts and advisers, that role should be mentioned also in the context of lenders, who frequently asked for the services of engineers and insurance advisers.

62. Mr. CHOUKRI (Observer for Morocco) expressed agreement with the representative of Spain that there was no need to refer to shareholders in paragraph 68 forward. He wished to expand on the point made by the representative of Spain that participants in projects might have different legal standings: a participant might be a limited liability company that did not issue shares. Also, shareholders met but once or twice a year at annual or extraordinary general meetings, while management was in charge all the time; shareholders looked for a combination of high and immediate returns and security, while management was immediately involved in the company's projects, some of which might last for years; and shareholder involvement in a particular project was that much more remote for every other project a company had in hand.

63. All references to shareholders should therefore be deleted, as should paragraph 69 in its entirety.

64. Ms. GUILLÉN (Venezuela), referring to paragraph 65, said that in the Spanish version, in the penultimate line, the words "que a la autoridad" should be replaced by "que la autoridad comisione o delegue".

65. Mr. LALLIOT (France) supported the comments and conclusions of the Observer for Morocco.

66. He took the point made by the representative of the World Bank about transfers of advanced technology as referred to in paragraph 66; however, instead of deleting the second sentence in the paragraph, it would be preferable to come up with some more nuanced language that would encourage technology transfers.

67. He took exception to the comments by the representative of the World Bank in connection with Eurotunnel and asked for clarification as to whether the representative of the World Bank had wished to make a point about transfers of technology. He recalled that in Eurotunnel a quadripartite concession had been involved, between France, the United Kingdom and two main concessionaires, one from the United Kingdom and one from France. There had never been any problems with transfers of technology. There were no problems that he knew of with Eurotunnel.

68. Mr. GUISLAIN (Observer for the World Bank) replied that he had mentioned Eurotunnel in the context of the participation in projects of operators rather than construction companies: governments should select companies that could provide services at a given price and quality. Eurotunnel, while exemplary from a technical point of view, had not been a great commercial success.

69. His point about the transfer of technology had been specifically about transfers of advanced technology: the priority in providing public services was not the technology used, or even the number of jobs created, it was the right service at the right price. The latter should be the goal of governments.

70. Mr. LALLIOT (France), responding to the statement by the previous speaker, said that he sat for the French Government on monitoring bodies covering United Kingdom/France joint projects, specifically Eurotunnel; the project had been technically flawless and flawless also in its commercial management and choice of concessionaires. He could not see what basis the representative of the World Bank had had for his remarks: he could provide him with the latest financial statement from the concessionaires, proving that the financial restructuring had been made possible because the commercial prospects for Eurotunnel were very good indeed. Further, if there were in fact any argument, it would involve France and the United Kingdom, not the World Bank.

71. Ms. MUSOLINO (Australia), referring to the comment by the representative of France on paragraph 66 in the context of local employment as against non-nondiscrimination, pointed out that a ban on discrimination between nationals of certain countries was not unique to the European Union: a number of other countries had bilateral or multilateral arrangements of a similar nature. She suggested that that issue could be taken up in section A.1 of the document, under the heading "Purpose and scope of the Guide", in a paragraph stating that existing or future bilateral or multilateral obligations might have areas of overlap with some of the issues discussed later in the document.

The meeting rose at 6 p.m.